

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Notice of Ex Parte Presentation Concerning Restoring Internet Freedom, WC Docket No. 17-108

On Friday, November 17th, Katie McAuliffe, Executive Director of Digital Liberty and Federal Affairs Manager at Americans for Tax Reform, met with Jay Schwarz, Wireline Advisor for Chairman Pai, to discuss the Restoring Internet Freedom proceeding.

Americans for Tax Reform and Digital Liberty support Restoring Internet Freedom by rolling back the Open Internet Order.

On August 16, 2017 we submitted comments signed by 83 state and national organizations, elected officials and private citizens.¹ These comments urge the FCC to return to the demonstrated success of the light touch regulatory model, and to do away with the general conduct standard.

The FCC should return the Internet to its Title I information service status.² Title II will slow deployment, which prevents unserved and underserved areas from receiving access. It also prevents additional competition from entering markets, so that Americans have more providers to choose from for their internet service.

Interstate Commerce

In terms of infrastructure, many of the most serious problems preventing increased Internet deployment originate at the state and local level. That includes misguided regulations on equipment and infrastructure, such as delayed permits with excessive fees for siting equipment, accessing rights-of-way, and deploying attachments.

However, since the Commission began the Restoring Internet Freedom proceeding, a number of states have taken it upon themselves to institute privacy rules that dictate business models, and some may even consider their own version of Title II rules.

For example, a California ballot initiative³ would prevent ISPs from offering discounts to customers based off of the sharing of information. The state should not preempt that business model, especially as we move into a world where a person's data may become more valuable than any other currency. California implementing this law would affect the possibility of this business model existing in other states. A flood of states implementing these types of privacy or their own version of Title II laws would have a negative impact on future deployment and network upgrades.⁴

¹ Restoring Internet Freedom, *Comments of Coalition of 83 Organizations, Elected Officials, & Individuals*, WC Dkt. No. 17-108 (Aug. 15, 2017), available at https://ecfsapi.fcc.gov/file/1081653713855/FCC%20Coalition%20Comments_No%20Title%20II%2008152017.pdf

² Katie McAuliffe, *The FCC Must Get Rid Of Archaic Internet Regulations To Unleash The Modern Digital Economy*, The Daily Caller (Nov. 15, 2017), <http://dailycaller.com/2017/11/15/the-fcc-must-get-rid-of-archaic-internet-regulations-to-unleash-the-modern-digital-economy/>

³ The California Consumer Privacy Act of 2018, available at <https://oag.ca.gov/system/files/initiatives/pdfs/17-0039%20%28Consumer%20Privacy%20V2%29.pdf>

⁴ Steve Forbes, *Don't let states disrupt Trump administration's 'net neutrality' rollback*, CNBC (Nov. 10, 2017), <https://www.cnbc.com/2017/11/10/fcc-net-neutrality-rollback-getting-disrupted-at-state-level-steve-forbes-commentary.html>

Rules governing traffic follow would also affect commerce within other states – information is fragmented, spread across the globe, and moves often. We cannot have states, in effect, creating their own data localization rules.

Further, routing and interconnection are complicated, and increased complexity decreases reliability as Richard Bennett points out.⁵ Further complexity placed on advertisers attempting to determine opt-in versus opt-out over county or state and with a highly mobile population certainly affects interstate commerce. As does applying the opt-in to one segment of the internet versus opt-out to another – and that is not just edge versus ISP, but also if there are distinctions between how rules apply to content delivery networks versus last mile.

The costs and consequences of complying with a patchwork of many state privacy or Title II-esque laws throughout the country would make it much more difficult for ISPs to maintain and expand their services, and invest in the next generation of broadband. As such, state level laws governing internet traffic would leave consumers with fewer choices, outmoded technology, and an overall lower quality internet experience.

State-based rules of this nature would likely fail in court since the Internet is clearly interstate commerce. However, the Commission should seriously consider reiterating that rules governing the follow of internet traffic can only originate at the federal level in its final Restoring Internet Freedom Order.

First Amendment Concerns

Internet service providers are speakers entitled to first amendment protections. The fact that they have not or vary rarely have used editorial discretion does not diminish their First Amendment Protections.⁶ When considering, *Reed v. Town of Gilbert*⁷ and *Turner Broadcasting v. Federal Communications Commission* and *Turner Broadcasting v. Federal Communications Commission (II)*,⁸ the FCC's Open Internet Order has serious problems.

As conversations move to legislation, the FCC would be wise to clarify the importance of First Amendment protections of private speakers, and by extension the private property rights of speakers. Speakers being both infrastructure provided by ISPs and services provided by ISPs, edge providers, or other applications.

Title II, and some other versions of “net neutrality,” prevent ISPs from setting the terms of their privately-owned networks; the Open Internet Order sets precedent and invites violations of property rights.⁹ The extension of this idea to “content neutrality” would prevent edge providers from determining their own business models for how content is curated, search algorithms, product recommendations, and the like. This predilection further infringes on First Amendment rights.

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⁵ Richard Bennett, *50 Shades of Needless Complexity: Avoiding Policy-Induced Outages*, HighTechForum (Nov. 8, 2017), <http://hightechforum.org/50-shades-of-needless-complexity/>

⁶ Fred B. Campbell, *The First Amendment and the Internet: The Press Clause Protects the Internet Transmission of Mass Media Content from Common Carrier Regulation*, 94 Neb. L. Rev. 559 (2015), available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=2831&context=nlr>

⁷ Restoring Internet Freedom, *Comments of Brent Skorup*, WC Dkt. No. 17-108 (Aug. 30, 2017), available at <https://ecfsapi.fcc.gov/file/10830271311126/Skorup-Restoring-Internet-Freedom-Mercatus-Comment-v1.pdf>

⁸ Gus Hurwitz, *The First Amendment and net neutrality's endgame*, Am. Enterprise Inst. (Nov. 17, 2017), <https://www.aei.org/publication/the-first-amendment-and-net-neutralitys-end-game/>

⁹ Clyde Wayne Crews Jr., *FCC's Net Neutrality Order To Ensnare Content And App Providers*, Forbes (Mar. 3, 2015), <https://www.forbes.com/sites/waynecrews/2015/03/03/fccs-net-neutrality-order-to-ensnare-content-and-app-providers/#158c8094c4f0>

The Federal Trade Commission and its consumer harm standard will be more effective at policing corporate conduct in the Internet ecosystem.¹⁰ The FTC is better equipped to deal with disputes between ISPs, edge providers, and other actors in the Internet system. A blanket claim of neutrality before seeing what services and business models may develop is not in the best interest of internet users or innovation.

Thank you for your consideration.

Regards,

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¹⁰ Roslyn Layton and Tom Struble, *Net Neutrality Without the FCC?: Why the FTC Can Regulate Broadband Effectively*, 18 The Federalist Society Review (2017), available at <https://fedsoc.org/commentary/publications/net-neutrality-without-the-fcc-why-the-ftc-can-regulate-broadband-effectively>